Supreme Court, U.S.
FILED

06-929 JAN 3 - 2007

OFFICE OF THE CLERK

No.

In the Supreme Court of the United States

ANTONIO RODRIGUEZ-ZAPATA,

Petitioner,

v.

ALBERTO R. GONZALES,
UNITED STATES ATTORNEY GENERAL,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

---

PETITION FOR A WRIT OF CERTIORARI

J. BRETT BUSBY
Counsel of Record
AMY P. MOHAN
Mayer, Brown, Rowe & Maw LLP
700 Louisiana St., Suite 3400
Houston, TX 77002
(713) 238-3000

Counsel for Petitioner

QUESTIONS PRESENTED

Under former 8 U.S.C. § 1182(c), certain lawful permanent residents ("LPRs") were eligible to seek discretionary relief from removal from the United States ("§ 212(c) relief"). When Antonio Rodriguez-Zapata was convicted of an aggravated felony by a jury in 1995, he would have been eligible to apply for § 212(c) relief. In 1996, however, Congress passed the Illegal Immigration Reform and Immigrant Responsibility Act ("IIRIRA"), which repealed § 212(c) and replaced it with a procedure called cancellation of removal. Cancellation of removal is not available to any LPR convicted of an aggravated felony. Removal proceedings were initiated against Rodriguez-Zapata in 2001. Both the Immigration Judge and the Board of Immigration Appeals denied his request to apply for § 212(c) relief despite strong equities in his favor. The Fifth Circuit affirmed, holding that the repeal of § 212(c) did not have an impermissible retroactive effect on LPRs convicted of an aggravated felony by a jury prior to IIRIRA. The Fifth Circuit also held that the right to seek § 212(c) relief is not protected by due process.

This case presents the following important question:

Whether an LPR convicted of an aggravated felony by a jury prior to IIRIRA remains eligible to seek § 212(c) relief, including two questions on which the courts of appeals are divided:

(1) Is a showing of reliance on prior law required to establish that a statute creates an impermissible retroactive effect and, if so, what type of reliance is required?

(2) Is the right to seek discretionary relief from removal under § 212(c) protected by the Due Process Clause of the Fifth Amendment?

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

TABLE OF AUTHORITIES iv

OPINIONS BELOW 1

JURISDICTION 1

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 1

STATEMENT 1

A. Rodriguez-Zapata's Background And Conviction 4

B. Section 212(c) Relief 6

C. Statutory Changes To § 212(c) Relief 7

D. Rodriguez-Zapata's Removal Proceedings And Habeas Petition 8

E. Fifth Circuit Decision 9

REASONS FOR GRANTING THE PETITION 10

I. THE FIFTH CIRCUIT'S DECISION CONFLICTS WITH CASES FROM THREE OTHER CIRCUITS AND THIS COURT ON THE ROLE OF RELIANCE IN RETROACTIVITY ANALYSIS. 10

A. A Three-Way Circuit Split Has Emerged On The Role Of Reliance In Retroactivity Analysis. 11

1. Six circuits have imposed an "actual reliance" requirement. 11

2. The Third, Fourth, and Tenth Circuits have held that "actual reliance" is not required 12

TABLE OF CONTENTS—continued

Page

3. Confusion over the role of reliance has emerged outside of the immigration context. 14

B. This Split Has Produced Different Outcomes Regarding Whether Aliens Convicted Of An Aggravated Felony After A Jury Trial Can Seek § 212(c) Relief. 16

C. The Fifth Circuit's Holding Contravenes This Court's Retroactivity Precedent. 18

II. THE COURTS OF APPEALS ARE DIVIDED ON WHETHER THE RIGHT TO SEEK § 212(C) RELIEF IS PROTECTED BY THE DUE PROCESS CLAUSE. 21

A. Several Circuits, Including The Fifth Circuit, Have Held That The Right To Seek § 212(c) Relief Is Not Protected By Due Process. 21

B. The Second And Ninth Circuits Have Recognized That The Right To Seek § 212(c) Relief Is Protected By Due Process. 23

III. ALIENS CONVICTED OF AN AGGRAVATED FELONY BY A JURY PRIOR TO IIRIRA ARE ENTITLED TO SEEK § 212(C) RELIEF. 25

A. Applying IIRIRA § 304(b) To LPRs Convicted By A Jury Prior To IIRIRA Creates An Impermissible Retroactive Effect. 25

B. Denial Of The Right To Seek § 212(c) Relief Is A Violation Of Due Process. 27

CONCLUSION 30

TABLE OF AUTHORITIES

Page(s)

CASES

Alexander v. *United States*,
121 F.3d 312 (7th Cir. 1997) 15

Appel v. *Gonzales*,
127 S. Ct. 659 (2006) 3, 16

Arevalo v. *Ashcroft*,
344 F.3d 1 (1st Cir. 2003) 29

Armendariz-Montoya v. *Sonchik*,
291 F.3d 1116 (9th Cir. 2002) 12, 16

Ashki v. *I.N.S.*,
233 F.3d 913 (6th Cir. 2000) 22

Bd. of Regents v. *Roth*,
408 U.S. 564 (1972) 28

Bonhometre v. *Gonzales*,
414 F.3d 442, 448 n.9 (3d Cir. 2005),
cert. denied, 126 S. Ct. 1362 (2006) 22

Bridges v. Wixon,
326 U.S. 135 (1945) 28

Brooks v. *Ashcroft*,
283 F.3d 1268 (11th Cir. 2002) 4, 12, 13, 16

Bustamante-Barrera v. Gonzales,
447 F.3d 388 (5th Cir. 2006) 3

Cardoso v. *Reno*,
216 F.3d 512 (5th Cir. 2000) 5

TABLE OF AUTHORITIES—continued

Page(s)

Chambers v. *Reno*,
307 F.3d 284 (4th Cir. 2002) 14

Dias v. *I.N.S.*,
311 F.3d 456 (1st Cir. 2002) (per curiam) 12, 13, 16

Edwards v. *I.N.S.*,
393 F.3d 299 (2d Cir. 2004) 23

Escudero-Corona v. *I.N.S.*,
244 F.3d 608 (8th Cir. 2001) 22

Fernandez-Vargas v. *Gonzales*,
126 S. Ct. 2422 (2006) 20

Ferreira v. *Ashcroft*,
382 F.3d 1045 (9th Cir. 2004) 3

Francis v. *I.N.S.*,
532 F.2d 268 (2d Cir. 1976) 6

Goncalves v. *Reno*,
144 F.3d 110 (1st Cir. 1998) 28

Graham v. *Johnson*,
168 F.3d 762 (5th Cir. 1999) 15

Greenholtz v. *Inmates of Neb. Penal & Corr. Complex*,
442 U.S. 1, 7 (1979) 28, 29

In re Hanserd,
123 F.3d 922 (6th Cir. 1997) 15, 26

Hem v. *Maurer*,
458 F.3d 1185 (10th Cir. 2006) 2, 10, 13, 17, 26

TABLE OF AUTHORITIES—continued

Page(s)

Hernandez-Castillo v. *Moore*,
436 F.3d 516 (5th Cir. 2006),
cert. denied, *127 S. Ct. 40* (2006).....2, 9, 11, 16

Hughes Aircraft v. *United States*,
520 U.S. 939 (1997).....3, 19, 20, 27

I.N.S. v. *St. Cyr*,
533 U.S. 289 (2001).....*passim*

In re Jones,
226 F.3d 328 (4th Cir. 2000).....4, 15

Kaweesa v. Gonzales,
450 F.3d 62 (1st Cir. 2006).....28

Kelava v. *Gonzales*,
434 F.3d 1120 (9th Cir. 2006),
cert. denied, 127 S. Ct. 43 (2006).....3, 10, 12, 15, 16

Landgraf v. *USI Film Prods.*,
511 U.S. 244 (1994).....*passim*

Lanza v. Ashcroft,
389 F.3d 917 (9th Cir. 2004).....28

Libby v. *Magnusson*,
177 F.3d 43 (1st Cir. 1999).....15

In re Marin,
16 I & N Dec. 581 (BIA 1978).....7, 29

Mathews v. *Diaz*,
426 U.S. 67 (1976).....28

TABLE OF AUTHORITIES—continued

Page(s)

Mathews v. *Eldridge*,
424 U.S. 319 (1976) 30

Mattis v. *Reno*,
212 F.3d 31 (1st Cir. 2000) 12

Montenegro v. *Ashcroft*,
355 F.3d 1035 (7th Cir. 2004) (per curiam) 12, 16

Oguejiofor v. *Att'y Gen. of the United States*,
277 F.3d 1305 (11th Cir. 2002) (per curiam) 22

Olatunji v. *Ashcroft*,
387 F.3d 383 (4th Cir. 2004) 10, 13, 14, 17, 20

Patel v. *Gonzales*,
545 U.S. 1103 (2005) 24

Ponnapula v. *Ashcroft*,
373 F.3d 480 (3d Cir. 2004) 2-3, 7, 12, 17, 19, 26, 29

Rankine v. *Reno*,
319 F.3d 93 (2d Cir. 2003) 2, 11, 12, 13, 16

Reyes v. *McElroy*,
543 U.S. 1057 (2005) 3, 7

Rivers v. *Roadway Express, Inc.*
511 U.S. 298 (1994) 20

Sidhu v. *Gonzales*,
127 S. Ct. 495 (2006) 16

TABLE OF AUTHORITIES—continued

Page(s)

In re Silva,
16 I & N Dec. 26 (BIA 1976).....6

Smith v. *Ashcroft*,
295 F.3d 425 (4th Cir. 2002).....22

Stephens v. *Ashcroft*,
543 U.S. 1124 (2005) (No. 04-6980).....4, 7

Thaqi v. *Jenifer*,
377 F.3d 500 (6th Cir. 2004).....13

Thom v. *Ashcroft*,
369 F.3d 158, 167-69 (2d Cir. 2004),
cert. denied, 126 S. Ct. 40 (2005).....26

Thom v. *Gonzales*,
126 S. Ct. 40 (2005).....3, 7

United States v. *Aguirre-Tello*,
353 F.3d 1199 (10th Cir. 2004).....22

United States v. *Charleswell*,
456 F.3d 347 (3d Cir. 2006).....24

United States v. *Copeland*,
376 F.3d 61 (2d Cir. 2004).....23, 24, 28, 29

United States v. *Lopez-Ortiz*,
313 F.3d 225 (5th Cir. 2002).....9, 21

United States v. *Luna*,
436 F.3d 312 (1st Cir. 2006).....24

TABLE OF AUTHORITIES—continued

Page(s)

United States v. *Roque-Espinoza*,
338 F.3d 724 (7th Cir. 2003) 22

United States v. *Santiago-Ochoa*,
447 F.3d 1015 (7th Cir. 2006) 22

United States v. *Torres*,
383 F.3d 92 (3d Cir. 2004) 22, 29

United States v. *Ubaldo-Figueroa*,
364 F.3d 1042 (9th Cir. 2004) 24

Zamora-Garcia v. *Gonzales*,
127 S. Ct. 380 (2006) 24

CONSTITUTIONAL PROVISIONS AND STATUTES

8 U.S.C. § 1182(c) ("§ 212(c)") ..... *passim*

8 U.S.C. § 1227(a)(2)(A)(iii) 8, 27

8 U.S.C. § 1229b 1, 8

8 U.S.C. § 1326 21

28 U.S.C. § 1254(1) 1

Anti-Terrorism and Effective Death
Penalty Act ("AEDPA"),
110 Stat. 1277 (1996), § 440(d) 7

TABLE OF AUTHORITIES—continued

Page(s)

Illegal Immigration Reform and Immigrant Responsibility Act ("IIRIRA"), 110 Stat. 3009 (1996), § 304(b) ..... *passim*

IIRIRA § 309(d)(2) 5

REAL ID Act, 119 Stat. 231 (2005), § 106(c) 9

U.S. CONST. amend. V, § 4 1

MISCELLANEOUS

OFFICE OF IMMIGRATION STATISTICS, U.S. DEP'T OF HOMELAND SECURITY, IMMIGRATION ENFORCEMENT ACTIONS: 2005 (2006), available at http://tinyurl.com/y8785n 18

PETITION FOR A WRIT OF CERTIORARI

Antonio Rodriguez-Zapata respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-2a) is unreported (Case No. 05-60778). The order of the Fifth Circuit denying Rodriguez-Zapata's petition for rehearing *en banc* is unreported. (App., *infra*, 8a-9a). The opinions of the Board of Immigration Appeals ("BIA") and the Immigration Judge ("IJ") are also unreported. (App., *infra*, 3a-7a).

JURISDICTION

The court of appeals' judgment was entered on August 3, 2006. The court of appeals denied a timely petition for rehearing *en banc* on October 4, 2006. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The following provisions are reprinted, in pertinent part, on page 10a of the Appendix: 8 U.S.C. § 1182(c) (1994 ed.); 8 U.S.C. § 1229b(a); IIRIRA § 304(b), 110 Stat. 3009; U.S. CONST. amend. V, § 4.

STATEMENT

The fundamental issue in this case is whether LPRs convicted of an aggravated felony by a jury prior to IIRIRA are entitled to seek § 212(c) relief in removal proceedings begun after IIRIRA repealed such relief. In *I.N.S.* v. *St. Cyr*, 533 U.S. 289, 326 (2001), this Court held that applying IIRIRA's repealing provision—§ 304(b)—to aliens who *pled guilty* to an aggravated felony prior to IIRIRA would create an impermissible retroactive effect. Since *St. Cyr*, the lower courts have struggled with the application of IIRIRA § 304(b) to aliens previously convicted of an aggravated felony *by a jury*. In this case, the Fifth Circuit concluded that such aliens are

not eligible to seek § 212(c) relief. In reaching that decision, the Fifth Circuit took a position on two important questions that have divided the courts of appeals.

First, the courts of appeals are deeply split over whether proof of "reliance" on prior law is required to establish that applying a new statute retroactively would be impermissible. In this case, the Fifth Circuit held that IIRIRA § 304(b) did not have an impermissible retroactive effect as applied to aliens who went to trial and were convicted of an aggravated felony before § 212(c) was repealed. The court relied exclusively on its prior decision in *Hernandez-Castillo* v. *Moore*, 436 F.3d 516 (5th Cir. 2006), *cert. denied*, 127 S. Ct. 40 (2006). *Hernandez-Castillo* held that IIRIRA § 304(b) was not impermissibly retroactive as to such aliens because they had not "detrimentally changed [their] position in reliance on continued eligibility for § 212(c) relief." 436 F.3d at 520 (quoting *Rankine* v. *Reno*, 319 F.3d 93, 99-100 (2d Cir. 2003)). This holding requires a showing of "actual reliance" on prior law to prove that a statute creates an impermissible retroactive effect—a position that conflicts directly with decisions of the Third, Fourth, and Tenth Circuits.

Five other circuits—the First, Second, Seventh, Ninth, and Eleventh—have likewise required a showing of actual reliance. By contrast, two circuits—the Third and Tenth—have concluded that, at most, this Court's retroactivity precedent requires a showing of reasonable reliance on prior law. The Fourth Circuit has gone even further, holding that no showing of reliance on prior law is required to establish an impermissible retroactive effect.

Under the reliance standards established by the Third, Fourth, or Tenth Circuits, this case would have been analyzed differently and likely would have resulted in a different outcome. Indeed, both the Third and Tenth Circuits have held that IIRIRA § 304(b) has an impermissible retroactive effect on aliens convicted by a jury in certain circumstances. See *Hem* v. *Maurer*, 458 F.3d 1185, 1191 (10th Cir. 2006); *Pon-*

napula v. *Ashcroft*, 373 F.3d 480, 493 (3d Cir. 2004). This conflict is especially troubling given the significant constitutional interest in uniform application of the immigration laws. See *Ferreira* v. *Ashcroft*, 382 F.3d 1045, 1050 (9th Cir. 2004) ("In the immigration context * * * the need for national uniformity is paramount * * *."); *Bustamante-Barrera v. Gonzales*, 447 F.3d 388, 399 (5th Cir. 2006) (noting "the overarching constitutional interest in uniformity of federal immigration and naturalization laws").

The Fifth Circuit's decision also contravenes this Court's well-established retroactivity precedent. The Court has blocked retroactive application of new laws without requiring any reliance—let alone actual reliance—on prior law. *E.g.*, *Hughes Aircraft* v. *United States*, 520 U.S. 939, 946-51 (1997) (holding statute was impermissibly retroactive without mentioning reliance). Rather, it consistently has held that a statute has an impermissible retroactive effect if it "attaches new legal consequences to events completed before its enactment." See *St. Cyr*, 533 U.S. at 321; *Landgraf* v. *USI Film Prods.*, 511 U.S. 244, 269-70 (1994).[1] As explained on pages 25-27 below, IIRIRA's repeal of § 212(c) meets that test.

---

[1] Unlike other petitions denied by this Court, this petition squarely presents the reliance issue and is not hindered by factual or procedural complications. See, *e.g.*, Petition for Writ of Certiorari, *Appel* v. *Gonzales*, 127 S. Ct. 659 (2006) (No. 06-72), 2006 WL 1994676 (involving retroactive application of IIRIRA § 304(b) to aliens convicted in jury trial but not presenting question on role of reliance); Brief For Respondent in Opposition at 5-6, *Kelava* v. *Gonzales*, 127 S. Ct. 43 (2006) (No. 05-1312), 2006 WL 2365437 (applying IIRIRA § 304(b) to alien deportable for "engaging in" terrorist activity); Brief For Respondent in Opposition at 11-12, *Thom* v. *Gonzales*, 126 S. Ct. 40 (2005) (No. 04-9116) (petitioner would not have been eligible for § 212(c) relief even under pre-IIRIRA law); Brief For Respondent in Opposition at 10-11, *Reyes* v. *McElroy*, 543 U.S. 1057 (2005) (No. 04-5983) (same); Brief For

Second, the Fifth Circuit held that eligibility to seek § 212(c) relief is not subject to due process protections. Five other circuits agree. Yet these decisions fail to recognize the critical distinction between the right to *seek* discretionary relief and the right to *receive* it. Moreover, they are directly contrary to decisions of the Second and Ninth Circuits, which have concluded that the right to seek § 212(c) relief is protected by the Due Process Clause.

As this Court has recognized, the number of aliens whose ability to remain in the United States depends on eligibility for § 212(c) relief is "extremely large" given the broad scope of removable offenses. *St. Cyr*, 533 U.S. at 296. Nine circuits have now addressed the role of reliance in analyzing the retroactive effect of IIRIRA § 304(b) and reached three conflicting results. See *Brooks* v. *Ashcroft*, 283 F.3d 1268, 1275 n.7 (11th Cir. 2002) (noting the "plethora of cases that have inundated [the circuits]" on the retroactivity issue). Confusion over the role of reliance has also emerged outside the immigration context, heightening the need for this Court's review.[2] Furthermore, eight circuits have taken conflicting positions on whether the right to seek § 212(c) relief is protected by due process. The Court should take this opportunity to resolve the disagreements among the lower courts on these important and recurring issues.

A. Rodriguez-Zapata's Background And Conviction

Rodriguez-Zapata was admitted to the United States as an LPR on May 5, 1981, at the age of 19, in Brownsville, Texas. R60.[3] Since his admission as an LPR, he has estab-

---

Respondent in Opposition at 10-11, *Stephens* v. *Ashcroft*, 543 U.S. 1124 (2005) (No. 04-6980) (same).

[2] See, *e.g.*, *In re Jones*, 226 F.3d 328, 331 (4th Cir. 2000) (noting "varying" approaches to role of reliance in retroactivity analysis of AEDPA habeas provisions).

[3] Unless otherwise noted, all citations to "R__" refer to the record before the Fifth Circuit.

lished deep and extensive family ties in the United States. He has been married to Eva D. Rodriguez, also an LPR, since 1984. R65, 68. The couple has four children, ages 9, 13, 16, and 20. R70-76. The three youngest children were born in the United States, while the oldest is an LPR. *Ibid.* In addition to his immediate family, Rodriguez-Zapata has strong ties to several extended family members in the United States. His father has been a United States citizen since 1979, and four of his siblings are legal residents; all currently live in Texas. R61, 78-86.

In addition to his extensive family ties, Rodriguez-Zapata has established significant employment and community ties. In the 25 years since his admission to the United States, he has maintained steady employment as a bricklayer. R118. The Rodriguez-Zapata family has resided continuously in Brownsville, Texas for many years. R60. In fact, the family's three youngest children were born in Brownsville. R72-76. In 2000, Rodriguez-Zapata and his wife purchased a home there. R193-96.

Despite these strong family and community ties, Rodriguez-Zapata's current removal order stems from a single incident that occurred over a decade ago. On October 18, 1995, Rodriguez-Zapata was convicted of one count of indecency with a child following a jury trial in Brownsville. R138. Although the sentencing range for the offense was two to twenty years imprisonment, given that he was a first offender, the jury recommended ten years probation and a $2,000 fine. R140, 144. He was scheduled to complete his probation on October 18, 2005. R122. At the time of his conviction, no removal proceedings were instituted against Rodriguez-Zapata.[4]

---

[4] In 1996, IIRIRA "changed the nomenclature of immigration orders so that orders of deportation and orders of exclusion are both now referred to as 'orders of removal.' " *Cardoso* v. *Reno*, 216 F.3d 512, 515 n.3 (5th Cir. 2000); IIRIRA § 309(d)(2), 110 Stat.

B. Section 212(c) Relief

Prior to 1996, certain LPRs under a final order of removal were eligible to seek discretionary relief from the Attorney General under 8 U.S.C. § 1182(c) based on equitable considerations. This provision, commonly known as "§ 212(c)," read in pertinent part:

> Aliens lawfully admitted for permanent residence who temporarily proceeded abroad voluntarily and not under an order of deportation, and who are returning to a lawful unrelinquished domicile of seven consecutive years, may be admitted in the discretion of the Attorney General without regard to the provisions of subsection (a) (other than paragraphs (3) and (9)(C)) * * * .

8 U.S.C. § 1182(c) (1994).[5] The statute imposed additional requirements for LPRs who, like Rodriguez-Zapata, had been convicted of an aggravated felony:

> The first sentence of this subsection shall not apply to an alien who has been convicted of one or more aggravated felonies and has served for such felony or felonies a term of imprisonment of at least 5 years.

Ibid. It is undisputed that under pre-IIRIRA law, Rodriguez-Zapata would have been eligible to seek § 212(c) relief. He (1) was a lawful permanent resident (2) with "unrelinquished domicile of seven consecutive years" who (3) had not served

---

3009-627 (1996). The terms "deportation" and "removal" are used interchangeably in this petition.

[5] Although § 212(c) on its face applies only to aliens seeking *admission* to the United States, it has long been interpreted to apply to LPRs seeking to avoid *removal* from the United States as well. See *Francis* v. *I.N.S.*, 532 F.2d 268 (2d Cir. 1976), adopted by BIA in *In re Silva*, 16 I & N Dec. 26, 28-30 (BIA 1976).

five or more years in prison for an aggravated felony.[6] See pp. 4-5, *supra*.

Under § 212(c), the IJ or BIA could grant discretionary relief from removal based on a number of equitable considerations, such as (1) "family ties within the United States," (2) "residence of long duration in this country," (3) "evidence of hardship to the respondent and family if deportation occurs," and (4) "a history of employment." *In re Marin*, 16 I & N Dec. 581, 584 (BIA 1978). Prior to the repeal of § 212(c), over half of the applications for relief were granted. *St. Cyr*, 533 U.S. at 296 n.5; see also *Ponnapula*, 373 F.3d at 486 (noting that relief was "predictably granted" when certain equitable factors were present).

C. Statutory Changes To § 212(c) Relief

In 1996, after Rodriguez-Zapata's conviction, Congress enacted two statutes that substantially changed the immigration laws. First, in April 1996, Congress passed the Anti-Terrorism and Effective Death Penalty Act ("AEDPA"). See 110 Stat. 1277. In § 440(d) of AEDPA, Congress amended 8 U.S.C. § 1182(c) to preclude § 212(c) relief for, among other groups, any alien who had been convicted of an "aggravated felony" after admission to the United States. *Ibid.*

In September 1996, Congress passed IIRIRA. See 110 Stat. 3009. IIRIRA § 304(b) repealed § 212(c) completely

---

[6] This is a critical factor that makes this petition a good vehicle for decision. In several recent petitions denied by this Court, the petitioners would not have been eligible for § 212(c) relief even under pre-IIRIRA law because they had already served more than five years in prison for an aggravated felony. See Brief For Respondent in Opposition at 11-12, *Thom* v. *Gonzales*, 126 S. Ct. 40 (2005) (No. 04-9116); Brief For Respondent in Opposition at 10-11, *Reyes* v. *McElroy*, 543 U.S. 1057 (2005) (No. 04-5983) (same); Brief For Respondent in Opposition at 10-11, *Stephens* v. *Ashcroft*, 543 U.S. 1124 (2005) (No. 04-6980) (same). Thus, any decision on retroactivity would have been advisory.

and replaced it with a new procedure called "cancellation of removal" (codified at 8 U.S.C. § 1229b). See 110 Stat. 3009-594. Like the amended § 212(c) under AEDPA, the new "cancellation of removal" process is not available to aliens who have been convicted of any aggravated felony. See 8 U.S.C. § 1229b(a)(3).

D. Rodriguez-Zapata's Removal Proceedings And Habeas Petition

On June 27, 2001, the Immigration and Naturalization Service ("I.N.S.") issued a Notice to Appear charging that Rodriguez-Zapata was deportable under 8 U.S.C. § 1227(a)(2)(A)(iii) because he had been convicted of an "aggravated felony" after admission to the United States. R224. The Notice to Appear cited his October 1995 conviction. *Ibid.* At his hearing before the IJ, he admitted the factual allegations in the Notice to Appear and conceded removability. R40. He also asserted his eligibility for § 212(c) relief. R40-41.

On September 13, 2002, he appeared before the IJ for a merits hearing during which he again asserted his eligibility for § 212(c) relief. R46. He argued that applying AEDPA and IIRIRA to deprive him of § 212(c) relief was impermissibly retroactive because his conviction had occurred prior to the passage of both laws. R50-52. The IJ concluded, however, that he "ha[d] no option but to find [Rodriguez-Zapata] not eligible for [§ 212(c)] relief" because he had been convicted of an aggravated felony following a jury trial rather than a guilty plea. App., *infra*, 6a. As a result, Rodriguez-Zapata was ordered removed to Mexico. R31.

Rodriguez-Zapata timely filed a notice of appeal with the BIA. R25. He argued again in his brief that, under Supreme Court precedent, the repeal of § 212(c) could not be applied retroactively to his case. R13-21. On December 10, 2003, the BIA summarily affirmed the removal order without opinion. App., *infra*, 3a.

Rodriguez-Zapata then challenged the removal order by filing a petition for a writ of habeas corpus in the U.S. District Court for the Southern District of Texas on January 6, 2004 (No. 1:04-cv-00004). Dkt. 1.[7] While his habeas petition was pending, Congress passed the REAL ID Act. 119 Stat. 231 (2005). Pursuant to § 106(c) of the REAL ID Act, the case was transferred to the Fifth Circuit on motion by the Government and converted into a petition for review. Dkt. 17.

E. Fifth Circuit Decision

In the Fifth Circuit, Rodriguez-Zapata argued that, under a correct reading of this Court's retroactivity precedent, IIRIRA § 304 cannot apply retroactively to his case because it attaches new legal consequences to past events: his underlying criminal conduct as well as his conviction. Pet. Br. 10-29. He noted that this Court's precedent does not require proof of reliance on prior law to show that applying a new statute retroactively is impermissible. *Ibid.* Rodriguez-Zapata also argued that denial of a § 212(c) hearing violated his due process rights. *Id.* at 33-41.

The panel rejected these arguments and denied Rodriguez-Zapata's petition for review. It cited *Hernandez-Castillo*, 436 F.3d at 517, 519-20, in concluding that "application of the Illegal Immigration Reform and Immigra[nt] Responsibility Act's repeal of INA § 212(c) to aliens who, like Rodriguez, went to trial and were convicted of an aggravated felony prior to the repeal of § 212(c), [does] not create an impermissible retroactive effect." App., *infra*, 2a. The panel also rejected Rodriguez-Zapata's argument that eligibility for § 212(c) relief is subject to due process protections, relying on *United States* v. *Lopez-Ortiz*, 313 F.3d 225, 230-31 (5th Cir. 2002). App., *infra*, 2a.

---

[7] In this petition, documents filed in the district court are cited by docket number.

REASONS FOR GRANTING THE PETITION

The IJ erred in finding Rodriguez-Zapata ineligible for § 212(c) relief for two independent reasons. Both implicate important and recurring splits of authority among the circuits that should be resolved by this Court.

I. THE FIFTH CIRCUIT'S DECISION CONFLICTS WITH CASES FROM THREE OTHER CIRCUITS AND THIS COURT ON THE ROLE OF RELIANCE IN RETROACTIVITY ANALYSIS.

As discussed below, the Fifth Circuit required proof of "actual reliance" on the availability of § 212(c) relief to establish that retroactive application of IIRIRA § 304(b) would be impermissible. This holding is directly contrary to decisions of the Third, Fourth, and Tenth Circuits. Moreover, the Fifth Circuit's decision contravenes this Court's retroactivity precedent by erroneously imposing an actual reliance requirement.

Several courts have noted the existence of this circuit split and its impact on the application of IIRIRA § 304(b). See *Hem*, 458 F.3d at 1191 (observing that the circuits have split on the "essential" issue of "whether reliance must be established objectively, subjectively, or even at all" in the retroactivity analysis of IIRIRA § 304(b)); *Kelava* v. *Gonzales*, 434 F.3d 1120, 1125, n.7 (9th Cir. 2006), *cert. denied*, 127 S. Ct. 43 (2006); *Olatunji* v. *Ashcroft*, 387 F.3d 383, 390 (4th Cir. 2004) (noting "substantial confusion as to whether a party must prove some form of reliance in order to demonstrate that a statute is impermissibly retroactive"). This case presents an opportunity for the Court to resolve the split of authority on this important and recurring issue while also clarifying its retroactivity precedent.

A. A Three-Way Circuit Split Has Emerged On The Role Of Reliance In Retroactivity Analysis.

1. Six circuits have imposed an "actual reliance" requirement.

In this case and its prior decision in *Hernandez-Castillo*, the Fifth Circuit joined five other circuits in requiring actual reliance on prior law to avoid retroactive application of IIRIRA § 304(b). This holding directly contradicts decisions of the Third, Fourth, and Tenth Circuits, all of which have held that actual reliance is not required to establish impermissible retroactivity.

The Second Circuit's opinion in *Rankine* v. *Reno*, 319 F.3d 93 (2d Cir. 2003), is representative of the decisions that require actual reliance. *Rankine* involved three aliens who, like Rodriguez-Zapata, were convicted of an aggravated felony by a jury prior to IIRIRA. *Id.* at 96-97. Applying this Court's touchstone statutory retroactivity case, *Landgraf*, the Second Circuit held that the aliens were not entitled to § 212(c) relief because they had not "detrimentally changed [their] position *in reliance* on continued eligibility for § 212(c) relief." *Id.* at 99 (emphasis added).

The *Rankine* court interpreted *St. Cyr* as holding that it was "*reliance*, and the consequent change of immigration status, that produced the impermissible retroactive effect of IIRIRA" on aliens who had pled guilty to aggravated felonies prior to passage of IIRIRA. *Id.* at 100 (emphasis added). Accordingly, the court concluded that "[b]ecause those aliens who went to trial prior to the elimination of § 212(c) relief cannot show that they altered their conduct *in reliance* on the availability of such relief, we hold that IIRIRA's repeal of § 212(c) is not impermissibly retroactive as applied to them." *Ibid.* (emphasis added).

The Fifth Circuit expressly adopted the reasoning of *Rankine* in *Hernandez-Castillo*, 436 F.3d at 520, quoting much of the above language. Four other circuits have like-

wise required a showing of actual reliance to avoid retroactive application of IIRIRA § 304(b). For instance, the First Circuit denied § 212(c) relief to an alien convicted by a jury because "there was not, and could not have been, reliance * * * on the availability of discretionary relief." *Dias* v. *I.N.S.*, 311 F.3d 456, 458 (1st Cir. 2002) (per curiam) (citing *Mattis* v. *Reno*, 212 F.3d 31, 38 (1st Cir. 2000), which held that alien must show that he "actually and reasonably relied on the availability of § 212(c) relief").

Likewise, in *Armendariz-Montoya* v. *Sonchik*, 291 F.3d 1116, 1121 (9th Cir. 2002), the Ninth Circuit denied § 212(c) relief to an alien convicted after trial because "[u]nlike aliens who pleaded guilty, aliens who elected a jury trial cannot plausibly claim they would have acted any differently if they had known about [elimination of § 212(c) relief]." The Ninth Circuit recently reaffirmed this position in *Kelava*, 434 F.3d at 1125 (9th Cir. 2006). See also *Montenegro* v. *Ashcroft*, 355 F.3d 1035, 1037 (7th Cir. 2004) (per curiam) (holding that alien convicted after jury trial was not eligible for § 212(c) relief because "such aliens did not abandon any rights or admit guilt in reliance on continued eligibility for § 212(c) relief"); *Brooks*, 283 F.3d at 1274 (11th Cir.) (denying § 212(c) relief because "[t]here are not the same concerns of *quid pro quo*, benefit for an exchange" when alien chooses trial rather than guilty plea).

2. The Third, Fourth, and Tenth Circuits have held that "actual reliance" is not required.

On the other hand, the Third, Fourth, and Tenth Circuits have held that actual reliance is not required to show that a statute has an impermissible retroactive effect. Writing for the Third Circuit in *Ponnapula*, Judge Becker explained that cases like *Rankine* that "require actual reliance by the party seeking to avoid retroactive application" turn the *Landgraf* framework on its head by "erect[ing] too high a barrier to triggering the presumption against retroactivity." 373 F.3d at 489, 491. Indeed, the court noted, "[i]t is a strange 'presump-

tion' * * * that arises only on so heightened a showing as actual reliance." *Id.* at 491. Instead, the Third Circuit held that, at most, Supreme Court retroactivity precedent requires reasonable reliance, not actual reliance. *Id.* at 493. Accordingly, the Third Circuit held that "because aliens * * * who affirmatively turned down plea agreements had a reliance interest in the potential availability of § 212(c) relief, * * * IIRIRA's repeal of § 212(c) is impermissibly retroactive with respect to such aliens."

More recently, the Tenth Circuit reached a similar conclusion in *Hem*. After a thorough examination of this Court's retroactivity precedent and the current circuit split, the Tenth Circuit concluded that it "[could not] follow [its] sister circuits that impose a requirement of subjective/actual reliance," citing *Rankine*, *Dias*, and *Brooks* as examples. *Hem*, 458 F.3d at 1191-92, 1196. Instead, the court held that "objectively reasonable reliance on prior law is sufficient to sustain a retroactivity claim." *Id.* at 1197. Applying this holding, the court concluded that the petitioner, who had been convicted of an aggravated felony after a jury trial and had not appealed his conviction, was entitled to seek § 212(c) relief. *Ibid.* The court reasoned that aliens who did not appeal their convictions may have wished to avoid the risk of additional charges or a longer sentence on remand that would render them ineligible for § 212(c) relief. *Ibid.* Thus, it concluded that applying IIRIRA § 304 to such aliens creates an impermissible retroactive effect. *Ibid.*; see also *Thaqi* v. *Jenifer*, 377 F.3d 500, 504 n.2 (6th Cir. 2004) (noting that "under *St. Cyr*, the petitioner need not demonstrate actual reliance upon the immigration laws in order to demonstrate an impermissible retroactive effect.").

In an opinion written by Judge Luttig, the Fourth Circuit went a step further. After a thorough review of this Court's cases, the Fourth Circuit held in *Olatunji* that "reliance (whether subjective or objective) is not a requirement of impermissible retroactivity." 387 F.3d at 388-89. While noting

the "confusion" that has pervaded the circuit courts on this issue, the *Olatunji* court concluded that a careful reading of this Court's precedent reveals that the proper focus of retroactivity analysis is whether "a statute * * * *in fact* impose[s] new legal consequences on past actions." *Id.* at 390-91, 394. Simply put, "reliance, in any form, is irrelevant to the retroactivity inquiry." *Id.* at 396. Although *Olatunji* involved a different provision of IIRIRA (related to the inadmissibility of criminal aliens re-entering the United States), its reasoning applies with equal force to IIRIRA § 304.[8]

3. Confusion over the role of reliance has emerged outside of the immigration context.

This confusion over the role of reliance in statutory retroactivity analysis has not been confined to the immigration context. For example, a similar dispute has emerged in habeas cases. In addition to the changes AEDPA made to immigration law, the statute also imposed significant new restrictions on the filing of successive habeas petitions. As a result, petitioners who had already filed their first habeas petitions prior to AEDPA challenged the application of the new rules, arguing that they had an impermissible retroactive effect.

---

[8] Notably, the Fourth Circuit in *Olatunji* took great pains to distinguish its own prior decision in *Chambers* v. *Reno*, 307 F.3d 284 (4th Cir. 2002). See *Olatunji*, 387 F.3d at 392-93. In *Chambers*, the Fourth Circuit held that aliens like Rodriguez-Zapata were not eligible for § 212(c) relief based, in large part, on its conclusion that aliens who proceeded to trial "[did] not have a reliance interest comparable to that which was at the heart of *St. Cyr*." 307 F.3d at 290. Although the discussion of "reliance" pervades the Fourth Circuit's *Chambers* opinion, it unequivocally eschewed "reliance" as a relevant part of retroactivity analysis in *Olatunji*. This obvious inconsistency only serves to highlight the confusion that has emerged in the lower courts about the role of "reliance" in the Supreme Court's retroactivity framework.

In one such case, *In re Jones*, 226 F.3d 328, 331 (4th Cir. 2000), the Fourth Circuit noted that other circuits analyzing the retroactivity of AEDPA had defined "reliance" in "varying ways." For example, the Fifth and Seventh Circuits required a showing of "actual detrimental reliance" on pre-AEDPA habeas law. *Ibid.*; see *Graham* v. *Johnson*, 168 F.3d 762, 785-86 (5th Cir. 1999) (stating that "the focus of our retroactivity inquiry should be on the detrimental reliance * * * placed on pre-AEDPA law"); *Alexander* v. *United States*, 121 F.3d 312, 314 (7th Cir. 1997) (finding no impermissible retroactive effect because petitioner had not relied on prior law). The First Circuit went even further, requiring the petitioner to show not only actual detrimental reliance but also that reliance was "objectively reasonable." *Libby* v. *Magnusson*, 177 F.3d 43, 51 (1st Cir. 1999). By contrast, the Sixth Circuit required only that the party "might have acted differently had he known of the new consequence." *In re Hanserd*, 123 F.3d 922, 931-32 (6th Cir. 1997) (expressly rejecting actual reliance requirement); see also *In re Jones*, 226 F.3d at 331 (holding that Fourth Circuit requires "some form of reliance on pre-AEDPA law" but declining to define standard).

As these cases demonstrate, confusion over the proper role of reliance in retroactivity analysis has pervaded the lower courts beyond the immigration context. As Congress passes future statutes with uncertain retroactive application, courts will continue to struggle with whether (and, if so, how) reliance affects their retroactive scope. The Court should take this opportunity to resolve the dispute and ensure a uniform retroactivity standard.

Although this Court recently denied other petitions raising similar issues, this case is a better vehicle for decision. For instance, this Court recently denied a petition for certiorari in *Kelava* v. *Gonzales*, 127 S. Ct. 43 (2006). In *Kelava*, however, the petitioner was rendered ineligible for § 212(c) relief because he "engaged in" terrorist activity, not because he had been convicted of an aggravated felony. Brief For Re-

spondent in Opposition at 2, *Kelava v. Gonzales*, 127 S. Ct. 43 (2006) (No. 05-1312), 2006 WL 2365437. Moreover, the petitioner may not have been eligible for § 212(c) relief even under pre-IIRIRA law.[9] *Id.* at 4-5.

B. This Split Has Produced Different Outcomes Regarding Whether Aliens Convicted Of An Aggravated Felony After A Jury Trial Can Seek § 212(c) Relief.

If Rodriguez-Zapata's petition had been filed in the Third, Fourth, or Tenth Circuits, it would have been analyzed far differently and likely would have resulted in a different outcome. The Fifth Circuit and other circuits imposing an actual reliance requirement have uniformly held that aliens convicted of an aggravated felony by a jury are not eligible for § 212(c) relief. See *Hernandez-Castillo*, 436 F.3d at 520; *Rankine*, 319 F.3d at 100; *Dias*, 311 F.3d at 458; *Montenegro*, 355 F.3d at 1037; *Armendariz-Montoya*, 291 F.3d at 1121; *Brooks*, 283 F.3d at 1274. An almost exclusive focus on "detrimental reliance" has led these courts to conclude that aliens convicted after a jury trial did not have reliance interests comparable to those who, like the petitioner in *St. Cyr*, pled guilty to an aggravated felony. Thus, these courts have concluded that IIRIRA § 304(b) is not impermissibly retroactive as applied to aliens previously convicted by a jury.

---

[9] This Court also recently denied petitions for certiorari in *Appel* v. *Gonzales*, 127 S. Ct. 659 (2006) and *Sidhu* v. *Gonzales*, 127 S. Ct. 495 (2006). While both cases involved retroactive application of IIRIRA § 304(b) to aliens convicted of an aggravated felony after a jury trial, both petitions presented narrower fact-bound questions. Neither petition squarely presented a question on the role of reliance in retroactivity analysis. See Petition for Writ of Certiorari at i, *Appel* (No. 06-72), 2006 WL 1994676 (question presented limited to aliens who affirmatively turned down a plea agreement before proceeding to trial); Petition for Writ of Certiorari at i, *Sidhu* (No. 06-140), 2006 WL 2136227 (question presented limited to § 212(c) context).

By contrast, the Third and Tenth Circuits have held that such aliens are still eligible for § 212(c) relief in certain circumstances. In *Ponnapula*, the Third Circuit held that aliens who had affirmatively turned down plea agreements remained eligible for § 212(c) relief because they "reasonably could have relied" on the availability of such relief in turning down the plea offer. 373 F.3d at 483.[10] In *Hem*, the Tenth Circuit also adopted a "reasonable reliance" standard and held that aliens who were convicted by juries and chose to forgo appeals of their convictions remained eligible for § 212(c) relief. 458 F.3d at 1199-1200. The court reasoned that, as a class, these aliens might have "reasonably been motivated by the availability of § 212(c) relief." *Id.* at 1199. Rodriguez-Zapata falls squarely within this class of aliens, as the record does not reflect that he ever appealed his conviction. Thus, his petition would almost certainly have been successful under Tenth Circuit law.

Rodriguez-Zapata's case also would have turned out differently under the Fourth Circuit's retroactivity analysis. No showing of reliance is required under Fourth Circuit law. See *Olatunji*, 387 F.3d at 388-89. Rather, the proper question is "simply whether the statute in question attached 'new legal consequences to events completed before its enactment.'" *Id.* at 390 (quoting *Landgraf*, 511 U.S. at 268). Here, the repeal of § 212(c) relief attached significant new legal consequences to Rodriguez-Zapata's conviction and his underlying conduct by converting possible deportation into certain deportation. *St. Cyr*, 533 U.S. at 325; see pp. 26-27, *infra*.

The retroactive application of § 212(c)'s repeal continues to have a significant impact on the many aliens subject to

[10] The record does not reflect whether Rodriguez-Zapata was ever offered a plea agreement. If the Court wishes to adopt the Third Circuit's reasoning in *Ponnapula*, this case should be remanded to the IJ for an evidentiary hearing on whether Rodriguez-Zapata was offered a plea agreement before he opted for a jury trial.

removal based on criminal convictions. See OFFICE OF IMMIGRATION STATISTICS, U.S. DEP'T OF HOMELAND SECURITY, IMMIGRATION ENFORCEMENT ACTIONS: 2005 at 5 (2006) (noting that criminal aliens accounted for 43% of all removals in 2005), available at http://tinyurl.com/y8785n. This Court should resolve the disagreement among the circuits and end the inconsistent results in § 212(c) cases.

C. The Fifth Circuit's Holding Contravenes This Court's Retroactivity Precedent.

Not only does the Fifth Circuit's decision in this case contribute to an intractable circuit split, it also contravenes this Court's well-established retroactivity framework. A careful reading of *Landgraf* and its progeny reveals that "reliance" is merely a factor in assessing whether applying a statute creates an impermissible retroactive effect. *Landgraf* itself spoke in sweeping terms, noting that "statutory retroactivity has long been disfavored" and that "the presumption against retroactive legislation is deeply rooted in our jurisprudence." 511 U.S. at 265, 268. Thus, in the absence of express congressional intent, a court "must ask whether the new provision attaches new legal consequences to events completed before its enactment." *Id.* at 269-70.

While the Court stated that "considerations of fair notice, reasonable reliance, and settled expectations offer sound guidance" in such an inquiry, *Landgraf* by no means held that a showing of reliance is *required* to find an impermissible retroactive effect. 511 U.S. at 270. Instead, the Court relied on Justice Story's oft-quoted definition of a retroactive statute:

> every statute, which takes away or impairs vested rights acquired under existing laws, or creates a new obligation, imposes a new duty, or attaches a new disability, in respect to transactions or considerations already past, must be deemed retrospective * * *.

Id. at 269 (internal quotation marks omitted). Thus, as the Court summarized, the proper inquiry is whether a new statute "would impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed." *Id.* at 280. Notably, the term "reliance" appears nowhere in these formulations of retroactivity.

Even more importantly, the facts of *Landgraf* itself demonstrate that reliance is not a requirement. In *Landgraf*, the Court considered whether the addition of compensatory and punitive damages remedies to Title VII suits in the Civil Rights Act of 1991 could be applied retroactively to conduct that occurred before the passage of the statute. 511 U.S. at 247. The Court acknowledged that "concerns of unfair surprise and upsetting expectations are attenuated in the case of intentional employment discrimination." *Id.* at 282 n.35. Nevertheless, the Court concluded that the new statute could not be applied retroactively because increasing a party's monetary liability for past actions "would attach an important new legal burden to that conduct." *Id.* at 283. The Court made little mention of the defendant's reliance—subjective or objective—on the prior state of the law. See *id.* at 280-93; see also *Ponnapula*, 373 F.3d at 491 (noting that the defendant in *Landgraf* "*is not even mentioned* in the pertinent section of the Court's opinion").

Similarly, in *Hughes Aircraft*, this Court used the *Landgraf* framework to block retroactive application of a new statute without mentioning reliance. There, the statute at issue enlarged the class of potential private plaintiffs that could bring suit under the False Claims Act. *Hughes Aircraft*, 520 U.S. at 941-42. The Court held that applying the new statute to actions completed before its passage would have a retroactive effect because it removed a defense to a False Claims Act suit and "chang[ed] the substance of the existing cause of action." *Id.* at 948. The Court reached this conclusion in the abstract, without *any* discussion of whether the

parties before the Court actually relied—or even whether similarly situated parties could reasonably have relied—on the prior state of the law. *Id.* at 946-51; see *Olatunji*, 387 F.3d at 391 (noting the absence of "reliance" as a factor in *Hughes Aircraft*).

St. Cyr did nothing to alter this line of precedent. To be sure, this Court in *St. Cyr* spent considerable time discussing the *quid pro quo* nature of plea agreements and the fact that many aliens pled guilty in reliance on the continued availability of § 212(c) relief. Yet the Court discussed these factors only as *evidence* that applying IIRIRA § 304 retroactively would "attach[] a new disability, in respect to transactions or considerations already past." *St. Cyr*, 533 U.S. at 321. As this Court explained in its recent decision in *Fernandez-Vargas* v. *Gonzales*, 126 S. Ct. 2422, 2431 (2006), the *St. Cyr* court concluded that "converting deportation from a likely possibility to a dead certainty would add such a burden, and application of the new law was accordingly barred." Further, *Fernandez-Vargas* did not impose any reliance requirement; it simply reaffirmed the *Landgraf* framework. *Id.* at 2428.

If "reliance" were in fact a required element of retroactivity analysis, surely this Court would not have neglected to so state in one of its many post-*Landgraf* decisions. Yet in no case has the Court purported to make reliance—let alone actual reliance—a prerequisite for finding that retroactive application of a statute is impermissible. To the contrary, this Court has held that a statute has an impermissible retroactive effect without even considering reliance on prior law. *Hughes Aircraft*, 520 U.S. at 946-51; see also *Rivers* v. *Roadway Express, Inc.* 511 U.S. 298, 304-13 (1994). Because the Fifth Circuit contravened this Court's deeply-rooted presumption against retroactivity by requiring Rodriguez-Zapata to prove actual reliance on prior law to avoid retroactive application of IIRIRA § 304(b), this Court should grant certiorari and reverse.

II. THE COURTS OF APPEALS ARE DIVIDED ON WHETHER THE RIGHT TO SEEK § 212(C) RELIEF IS PROTECTED BY THE DUE PROCESS CLAUSE.

The Fifth Circuit also rejected Rodriguez-Zapata's assertion that denial of a § 212(c) merits hearing violated his due process rights. The court held that the right to seek § 212(c) relief is not subject to due process protections, relying exclusively on its prior decision in *Lopez-Ortiz*. This holding is directly contrary to decisions of the Second and Ninth Circuits, which have held that the right to seek § 212(c) relief is protected by due process. Because of the important constitutional interest at stake, this Court should grant certiorari to resolve the disagreement among the circuits.

A. Several Circuits, Including The Fifth Circuit, Have Held That The Right To Seek § 212(c) Relief Is Not Protected By Due Process.

The Fifth Circuit, along with five other circuits, has held that aliens have no due process interest in the right to seek § 212(c) relief. In reaching that conclusion, these courts have focused on the discretionary nature of § 212(c) relief. The Fifth Circuit's decision in *Lopez-Ortiz*, cited as controlling precedent in this case, is representative. There, the petitioner asserted that his removal hearing for illegal re-entry was fundamentally unfair because the IJ failed to inform him of his right to seek § 212(c) relief. *Lopez-Ortiz*, 313 F.3d at 230. The Fifth Circuit disagreed, holding that the right to seek § 212(c) relief did not warrant due process protection. *Id.* at 231. The court reasoned that "[a]s a piece of legislative grace, it conveyed no rights, it conferred no status." *Ibid.* (internal quotation marks omitted). Thus, the Fifth Circuit concluded that "eligibility for § 212(c) relief is not a liberty or property interest warranting due process protection." *Ibid.*[11]

---

[11] *Lopez-Ortiz* arose in the context of removal proceedings for illegal re-entry under 8 U.S.C. § 1326, as did the other cases cited in

Five other circuits agree. For instance, in *United States* v. *Torres*, 383 F.3d 92, 104 (3d Cir. 2004), the Third Circuit concluded that "because discretionary relief is necessarily a matter of grace rather than of right, aliens do not have a due process liberty interest in consideration for such relief." Likewise, the Seventh Circuit noted in *United States* v. *Roque-Espinoza*, 338 F.3d 724, 729 (7th Cir. 2003), that "it would be hard to show that the loss of a chance at wholly discretionary relief from removal is the kind of deprivation of liberty or property that the due process clause is designed to protect." The Seventh Circuit has since directly addressed the issue, holding that the right to be considered for discretionary relief is not protected by due process. See *United States* v. *Santiago-Ochoa*, 447 F.3d 1015, 1020 (7th Cir. 2006); see also *Smith* v. *Ashcroft*, 295 F.3d 425, 430 (4th Cir. 2002) (holding that alien "had no protected liberty or property interest in discretionary 212(c) relief"); *Oguejiofor* v. *Att'y Gen. of the United States*, 277 F.3d 1305, 1309 (11th Cir. 2002) (per curiam) ("[A]n alien has no constitutionally-protected right to discretionary relief or to be eligible for discretionary relief."); *United States* v. *Aguirre-Tello*, 353 F.3d 1199, 1205 (10th Cir. 2004).[12]

---

this section. As this case shows, however, courts also apply the due process holdings of these decisions to cases involving removal of aliens convicted of an aggravated felony. See also *Bonhometre* v. *Gonzales*, 414 F.3d 442, 448 n.9 (3d Cir. 2005), *cert. denied*, 126 S. Ct. 1362 (2006).

[12] Two other circuits have held that the right to seek suspension of deportation, a related form of pre-IIRIRA discretionary relief for non-LPRs, is not protected by due process. See *Ashki* v. *I.N.S.*, 233 F.3d 913, 921 (6th Cir. 2000) ("Eligibility for suspension is not a right protected by the Constitution. * * * Because suspension of deportation is discretionary, it does not create a protectible liberty or property interest."); *Escudero-Corona* v. *I.N.S.*, 244 F.3d 608, 615 (8th Cir. 2001) (same).

B. The Second And Ninth Circuits Have Recognized That The Right To Seek § 212(c) Relief Is Protected By Due Process.

Both the Second and Ninth Circuits have held, however, that eligibility for § 212(c) relief is subject to due process protection. Because these decisions create an intractable circuit split, this Court should step in to resolve the conflict.

In *United States* v. *Copeland*, 376 F.3d 61, 72 (2d Cir. 2004), the Second Circuit recognized that the right to seek § 212(c) relief is subject to constitutional protection. The question in *Copeland* was whether the failure of an immigration judge to inform an alien of his right to seek § 212(c) relief rendered his removal hearing "fundamentally unfair." *Id.* at 71. Noting the circuit split, the Second Circuit expressly rejected the view that simply because § 212(c) relief is discretionary, it is not entitled to any constitutional protection. *Id.* at 71-72. To the contrary, the court pointed out that the "the right to a Section 212(c) *hearing* is well established and mandatory, whether or not the ultimate granting of *relief* is discretionary." *Id.* at 72 (emphasis added).

The Second Circuit's reasoning turned on the "distinction between a right to *seek* relief and the right to that relief *itself*," a distinction that this Court has also recognized. *Copeland*, 376 F.3d at 72 (emphasis added); see *St. Cyr*, 533 U.S. at 307 ("Traditionally, courts recognized a distinction between eligibility for discretionary relief, on the one hand, and the favorable exercise of discretion on the other hand."). The *Copeland* court criticized other circuits for failing to recognize the distinction. 376 F.3d at 72. By "collaps[ing] this distinction," the court explained, those circuits "incorrectly assume that, because the grant of Section 212(c) relief is itself discretionary, the denial of a Section 212(c) hearing cannot be a fundamental procedural error." *Ibid.*; see also *Edwards* v. *I.N.S.*, 393 F.3d 299, 308 (2d Cir. 2004) (citing *Copeland* for proposition that "an erroneous denial of the op-

portunity to apply for § 212(c) relief may constitute a due process violation").

The Ninth Circuit also has held that eligibility for § 212(c) relief is subject to due process protections. As in *Copeland*, the petitioner in *United States* v. *Ubaldo-Figueroa*, 364 F.3d 1042, 1048 (9th Cir. 2004), argued that the failure of the IJ to inform him of his right to seek § 212(c) relief violated his due process rights. The Ninth Circuit agreed, explaining that "[t]he requirement that the IJ inform an alien of his or her ability to apply for relief from removal is 'mandatory.'" *Id.* at 1050. Thus, "failure to so inform the alien [of his or her eligibility for relief from removal] is a denial of due process that invalidates the underlying deportation proceeding." *Ibid.* (internal quotation marks omitted). Under this analysis, the IJ's statement that Rodriguez-Zapata was not eligible for § 212(c) relief (App., *infra*, 6a), which was erroneous for the reasons explained below, is likewise a denial of due process.

Several courts have recognized the existence of this circuit split. See, *e.g.*, *United States* v. *Charleswell*, 456 F.3d 347, 359 n.13 (3d Cir. 2006); *United States* v. *Luna*, 436 F.3d 312, 319-20 (1st Cir. 2006); *Copeland*, 376 F.3d at 70 (noting "disagreement among the circuits" on the issue). Most circuits have now weighed in on the issue, making it ripe for this Court's review. Although the Court recently denied two petitions raising the circuit split over due process protection for § 212(c) eligibility, those cases were hindered by procedural and factual complications not present here.[13] The Court

[13] See Brief For Respondent in Opposition at 5-6, *Patel* v. *Gonzales*, 545 U.S. 1103 (2005) (No. 04-682), 2005 WL 1123568 (raising jurisdictional challenge because court of appeals never ruled on due process question and petitioner failed to exhaust administrative remedies); Petition for Writ of Certiorari at 7-8, *Zamora-Garcia* v. *Gonzales*, 127 S. Ct. 380 (2006) (No. 05-1519), 2006 WL 1502925 (framing due process claim in terms of ineffective assistance of counsel).

should grant this petition to resolve the circuit split on this important constitutional question.

III. ALIENS CONVICTED OF AN AGGRAVATED FELONY BY A JURY PRIOR TO IIRIRA ARE ENTITLED TO SEEK § 212(C) RELIEF.

The Fifth Circuit's decision in this case should be reversed because LPRs convicted of an aggravated felony by a jury prior to the passage of IIRIRA remain eligible for § 212(c) relief. Application of IIRIRA § 304(b) to these aliens has an impermissible retroactive effect and deprives them of due process.

A. Applying IIRIRA § 304(b) To LPRs Convicted By A Jury Prior To IIRIRA Creates An Impermissible Retroactive Effect.

Contrary to the decisions below, applying IIRIRA § 304(b) to Rodriguez-Zapata results in a harsh and impermissible retroactive effect. This Court's opinion in *Landgraf* established a two-part test for determining whether a statute is impermissibly retroactive. 511 U.S. at 280. First, a court must determine whether Congress has "expressly prescribed the statute's proper reach." *Ibid.* Because this Court held in *St. Cyr* that Congress has not expressly prescribed the temporal reach of IIRIRA § 304, only the second step of the *Landgraf* analysis is relevant here. *St. Cyr*, 533 U.S. at 320. That step requires examination of:

> whether the new statute would have retroactive effect, *i.e.*, whether it would impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed.

Landgraf, 511 U.S. at 280. If so, the "traditional presumption teaches that it does not govern absent clear congressional intent favoring such a result." *Ibid.*

Since *St. Cyr*, many courts have concluded that IIRIRA § 304 does not have an impermissible retroactive effect on

aliens convicted by a jury given their purported lack of "reliance" on prior law. As explained on pages 18-20, *supra*, however, a proper reading of this Court's precedent reveals that reliance is merely one factor in a retroactivity analysis.[14]

The correct retroactivity inquiry centers on "the nature and extent of the change in the law and the degree of connection between the operation of the new rule and a relevant past event." *Landgraf*, 511 U.S. at 270. The appropriate "relevant past event" in this case is *not* Rodriguez-Zapata's decision to go to trial, but rather his underlying criminal conduct or, in the alternative, his actual conviction. See *id.* at 282-83 (identifying underlying conduct as relevant past event); *Thom* v. *Ashcroft*, 369 F.3d 158, 167-69 (2d Cir. 2004), *cert. denied*, 126 S. Ct. 40 (2005) (Underhill, J., dissenting) (asserting that "relevant past event" is the conviction itself). Viewed from either vantage point, the application of IIRIRA § 304 to Rodriguez-Zapata undoubtedly "attaches new legal consequences to events completed before its enactment."

At the time Rodriguez-Zapata committed his underlying crime, he faced imprisonment and possible deportation. IIRIRA's elimination of § 212(c) relief for all aggravated felons converted *possible* deportation into *certain* deportation by eliminating any chance for § 212(c) relief. As this Court recognized in *St. Cyr*:

> There is a clear difference, for the purposes of retroactivity analysis, between facing possible deportation and facing certain deportation.

---

[14] Even if reliance is required, at most, this Court's precedent requires a showing of "reasonable reliance." See *Hem*, 458 F.3d at 1191; *Ponnapula*, 373 F.3d at 493; *In re Hanserd*, 123 F.3d 922, 932 n.17 (6th Cir. 1997) (noting that "conscious reliance on an old law is relevant" but "has never been the touchstone of retroactivity analysis"). Because Rodriguez-Zapata did not appeal his conviction, he fits squarely within the class of aliens defined in *Hem* and thus remains eligible for § 212(c) relief.

533 U.S. at 325. Whether viewed as "attach[ing] a new disability, in respect to transactions or considerations already past" or "increas[ing] a party's liability for past conduct," eliminating § 212(c) relief drastically altered the consequences of Rodriguez-Zapata's crime. See *Landgraf*, 511 U.S. at 269, 280.

In the alternative, this Court should consider Rodriguez-Zapata's conviction as the relevant past event. At the moment of Rodriguez-Zapata's conviction, he became subject to *possible* deportation. See 8 U.S.C. § 1227(a)(2)(A)(iii). When IIRIRA eliminated all discretionary relief for aliens convicted of an aggravated felony, however, Rodriguez-Zapata became subject to *certain* deportation. As in *Hughes Aircraft*, IIRIRA essentially eliminated a defense to removal. See *Hughes Aircraft*, 520 U.S. at 948 (noting that elimination of a defense "attach[ed] a new disability" to past events). The conversion of possible deportation into certain deportation is precisely the type of "new legal consequence" that renders a statute impermissibly retroactive under the *Landgraf* framework. See *Landgraf*, 511 U.S. at 269-70.

In sum, whether viewed at the time of Rodriguez-Zapata's underlying conduct or at the time of his conviction, IIRIRA § 304 "attach[ed] new legal consequences," "increase[ed]* * *liability for past conduct," and "swe[pt] away settled expectations" attendant to a relevant past event. See *Landgraf*, 511 U.S. at 266, 268, 270, 279-80. Absent an express statement of congressional intent—which this Court has held does not exist for IIRIRA § 304—*Landgraf* dictates that such a statute must not be applied to "cases arising before its enactment." *Id.* at 286. Thus, Rodriguez-Zapata remains eligible for § 212(c) relief and this Court should grant certiorari to reverse the Fifth Circuit's erroneous decision.

B. Denial Of The Right To Seek § 212(c) Relief Is A Violation Of Due Process.

By denying Rodriguez-Zapata the opportunity to apply for § 212(c) relief, the IJ and BIA also deprived him of due

process. This Court has long recognized that aliens are protected by the Due Process Clause. See *Mathews* v. *Diaz*, 426 U.S. 67, 77 (1976). Due process protections apply "when government action deprives a person of liberty or property." *Greenholtz* v. *Inmates of Neb. Penal & Corr. Complex*, 442 U.S. 1, 7 (1979). Thus, the threshold inquiry is whether Rodriguez-Zapata has a "life, liberty, or property" interest sufficient to invoke due process protections. See *Bd. of Regents* v. *Roth*, 408 U.S. 564, 571 (1972). As this Court and others have recognized, significant liberty interests are at stake in removal proceedings. See *Bridges v. Wixon*, 326 U.S. 135, 155 (1945); see also *Kaweesa v. Gonzales*, 450 F.3d 62, 69 (1st Cir. 2006) ("The liberty interests involved in removal proceedings are of the highest order.") (quoting *Lanza v. Ashcroft*, 389 F.3d 917, 927 (9th Cir. 2004)).

While there is no question that Rodriguez-Zapata does not have a protected interest in *receiving* § 212(c) relief, at the moment of his conviction, he gained a protected interest in the right to *seek* § 212(c) relief. See *St. Cyr*, 533 U.S. at 314-15 (noting that alien became both subject to deportation and eligible for § 212(c) relief at the time of his guilty plea). Despite the Fifth Circuit's focus on the discretionary nature of § 212(c) relief, this Court has made clear that aliens have a meaningful interest in the right to seek relief. As the Court stated in *St. Cyr*:

> [T]he fact that § 212(c) relief is discretionary does not affect the propriety of our conclusion. There is a clear difference, for the purposes of retroactivity analysis, between facing possible deportation and facing certain deportation.

Id. at 325; see also *Goncalves* v. *Reno*, 144 F.3d 110, 128 (1st Cir. 1998) (stating that § 212(c) is "a form of relief that, while discretionary, is plainly substantive"). As the Second Circuit noted in *Copeland*, the Court in *St. Cyr* "recognized the importance of being able to seek [§ 212(c)] relief and that

the right to seek such relief, even if discretionary, cannot be lightly revoked." 376 F.3d at 73.

The importance of § 212(c) relief is underscored by the manner in which it has been administered by the IJs and the BIA. Contrary to the suggestion of some courts, the exercise of discretion in granting § 212(c) relief has not been completely unfettered. In *In re Marin*, 16 I & N Dec. at 584, the BIA established a list of factors traditionally considered in determining whether § 212(c) relief was warranted. This Court has noted that the factors established by the BIA in *Marin* and subsequent cases are "comparable to common-law rules." *St. Cyr*, 533 U.S. at 296 n.5. Thus, § 212(c) relief has been "predictably granted" when such factors are present. *Ponnapula*, 373 F.3d at 486. In similar circumstances, this Court has recognized that discretionary relief can give rise to a constitutionally protected interest.[15]

In sum, the Fifth Circuit failed to acknowledge the critical distinction between the right to *seek* discretionary relief and the right to *receive* it, a distinction that this Court and others have recognized. See *St. Cyr*, 533 U.S. at 307 ("Traditionally, courts recognized a distinction between eligibility for discretionary relief, on the one hand, and the favorable exercise of discretion on the other hand."); see also *Torres*, 383 F.3d at 105 (noting same distinction); *Copeland*, 376 F.3d at 72; *Arevalo* v. *Ashcroft*, 344 F.3d 1, 15 (1st Cir. 2003) ("A right to seek relief is analytically separate and distinct from a right to the relief itself."). As the Second and Ninth Circuits have held, the right to seek relief is properly subject to due process protections. See pp. 22-24, *supra*.

---

[15] In *Greenholtz*, the Court held that prisoners were entitled to due process protection under a state parole statute because the statute created a "legitimate expectation of release absent the requisite finding that one of the [statutory conditions] exist[ed]." 442 U.S. at 12.

Despite Rodriguez-Zapata's constitutionally protected right to seek § 212(c) relief, he has been afforded no opportunity to do so. The "fundamental requirement of due process is the opportunity to be heard 'at a meaningful time and in a meaningful manner.'" *Mathews* v. *Eldridge*, 424 U.S. 319, 333 (1976). He has never been afforded any opportunity—let alone a "meaningful" one—to vindicate that right. Rodriguez-Zapata has never been afforded a hearing on the merits of his § 212(c) petition, even though a merits hearing is obviously at the heart of any meaningful opportunity to seek discretionary relief. By denying Rodriguez-Zapata any opportunity to present his substantial evidence on the merits, the IJ and the BIA have deprived him of the right to seek § 212(c) relief in violation of the Due Process Clause of the Fifth Amendment.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

J. BRETT BUSBY
Counsel of Record
AMY P. MOHAN
Mayer, Brown,
Rowe & Maw LLP
700 Louisiana St., Suite 3400
Houston, TX 77002
(713) 238-3000

Counsel for Petitioner

JANUARY 2007

APPENDIX

APPENDIX A

United States Court of Appeals
Fifth Circuit

FILED
August 3, 2006
Charles R. Fulbruge III, Clerk

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 05-60778
Summary Calendar

ANTONIO RODRIGUEZ-ZAPATA,

Petitioner,

Versus

ALBERTO R. GONZALES, U.S. ATTORNEY GENERAL,

Respondent.

Petition for Review of an Order of the
Board of Immigration Appeals
(BIA No. A36 743 567)

Before SMITH, WIENER, and OWEN, Circuit Judges.

PER CURIAM:*

Antonio Rodriguez-Zapata (Rodriguez) filed a 28 U.S.C. § 2241 petition challenging a final order of deportation. The district court properly transferred the petition to this court. *See* REAL ID Act, Pub. L. No. 109-13, 199 Stat. 213, 311 (2005); 8 U.S.C. § 1252; *Rosales v. Bureau of Immigration and Customs Enforcement*, 426 F.3d 733, 736 (5th Cir. 2005), *cert. denied*, 126 S. Ct. 1055 (2006). Pursuant to the REAL ID Act, we consider Rodriguez's § 2241 petition as a timely petition for review. *See Rosales*, 426 F.3d at 736.

Rodriguez asserts that retroactive application of the repeal of Immigration and Nationality Act (INA) § 212(c), 8 U.S.C. § 1182(c), to his case was impermissible; that the denial of INA § 212(c) relief to him violates due process; and that the denial of an INA § 212(c) merits hearing violates his due process. Rodriguez's arguments are without merit.

In *Hernandez-Castillo v. Moore*, 436 F.3d 516, 517, 519-20 (5th Cir.), *petition for cert. filed*, 74 U.S.L.W. 3572 (U.S. March 28, 2006) (No. 05-1251), we concluded that application of the Illegal Immigration Reform and Immigration Responsibility Act's repeal of INA § 212(c) to aliens who, like Rodriguez, went to trial and were convicted of an aggravated felony prior to the repeal of § 212(c), did not create an impermissible retroactive effect. Additionally, in *United States v. Lopez-Ortiz*, 313 F.3d 225, 230-31 (5th Cir. 2002), we held that eligibility for discretionary relief under INA § 212(c) is not an interest warranting constitutional due process protection.

Accordingly, Rodriguez's petition for review is DENIED.

---

* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

APPENDIX B

U.S. Department of Justice
Executive Office for Immigration Review

Decision of the Board of Immigration Appeals

Falls Church, Virginia
22041

File: A36-743-567-HARLINGEN Date: Dec. 10, 2003

In re: RODRIGUEZ ZAPATA, ANTONIO

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Waddle, Paula

ON BEHALF OF DHS: Lessa N. Whatmough, Assistant District Counsel

ORDER:

PER CURIAM. The Board affirms, without opinion, the results of the decision below. The decision below is, therefore, the final agency determination. *See* 8 C.F.R. § 1003.1(e)(4).

s/ *Roger A. Paul*
FOR THE BOARD

APPENDIX C

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
UNITED STATES IMMIGRATION COURT
Harlingen, Texas

File No.: A 36 743 567 September 13, 2002

In the Matter of	)	
ANTONIO RODRIGUEZ ZAPATA	)	IN REMOVAL PROCEEDINGS
Respondent	)	

CHARGE: Immigration and Nationality Act Section 237(a)(2)(A)(iii), as amended, in that at any time after admission, you have been convicted of an aggravated felony as defined in Section 101(a)(43) of the Act.

APPLICATIONS: Section 212(c) waiver of inadmissibility.

ON BEHALF OF RESPONDENT:	ON BEHALF OF SERVICE:
Paula Waddle	Tom Bernstein

ORAL DECISION OF THE IMMIGRATION JUDGE

The respondent is a male native and citizen of Mexico. Respondent was originally admitted to the United States as a lawful permanent resident on or about May 5, 1981. The Immigration and Naturalization Service, hereafter Service, issued a Notice to Appear, dated June 27, 2001, in the name of the respondent.

The Notice to Appear is marked as Exhibit No. 1 in the record. In the Notice to Appear, hereafter the NTA, the Service alleges that the respondent is removable on the charge set forth above. That is, the respondent has been convicted of an aggravated felony.

During the proceedings, the respondent appeared with counsel, admitted the truth of the factual allegations in the NTA, and conceded removability on the charge set forth above. The Service then presented conviction documents, which have been marked and admitted into the record as Exhibit No. 2. The evidence presented does establish that respondent was convicted on October 18, 1995 in the 103rd District Court in Cameron County, Texas for the offense of indecency with a child in violation of Texas Penal Code. Exhibit No. 2 does reflect that respondent pled not guilty before a jury. Respondent was found guilty as reflected in Exhibit No. 2, page 6. The jury found respondent guilty of indecency with a child as charged, and as reflected on page 9 of Exhibit No. 2, the respondent was sentenced to ten years probation with a fine of $2,000.

Upon the basis of the respondent's admissions and respondent's concession of removability and the documentary evidence of record, I conclude that removability has been established by evidence that is clear and convincing. During the course of proceedings, the respondent designated Mexico as the country of removal in the event removal were to be ordered. The respondent then requested relief in the form of a 212(c) waiver of inadmissibility. Respondent has submitted an application for 212(c), waiver of inadmissibility, as was applicable prior to 1996, prior to the enactment of the Anti-Terrorism and Effective Death Penalty Act of 1996. The respondent has requested the waiver of 212(c) relying upon *INS v. St. Cyr*, 121 S.Ct. 2271 (2001). Respondent had been convicted of an aggravated felony, but the conviction happened prior to April 24, 1996, which should make respondent eligible for 212(c). The only problem is that in order for respondent to be eligible, he must have pled guilty prior to that date of April 24, 1996, but as is reflected in the documentary evidence of record, specifically Exhibit No. 2, respondent did not plead guilty. Instead respondent was tried before a jury and was convicted by the jury and sentenced by that jury.

Therefore, the Court finds the respondent would not be eligible, and is not eligible, for that form of relief. The Supreme Court of the United States determined that the restrictions on 212(c) relief do not apply retroactively to aliens who have pled guilty prior to that April 24, 1996. Respondent did not plead guilty. Instead he was found guilty by a jury. As such, the Court has no option but to find the respondent not eligible for that form of relief, and at this time does pretermit the respondent's application for 212(c).

For the record, the Court has marked as Group Exhibit No. 3 the documents, including the Form I-191, which has been properly fee'd and properly filed with the Court, with proper documentation, a large number of documents and a great deal of documents reflecting the respondent has paid the fee and has properly requested the 212(c) relief. Respondent also has, and the Court does states this, that the respondent did present himself today with a large number of witnesses. Nonetheless, the Court has no option but to pretermit respondent's request for relief pursuant to 212(c), as respondent is not eligible for that form of relief as he did not plead guilty. Instead he was found guilty by a jury. As such, the Court will enter the following orders.

ORDER

IT IS HEREBY ORDERED the respondent is not eligible for the requested relief of 212(c).

IT IS FURTHER ORDERED the respondent is subject to removal.

IT IS FURTHER ORDERED the respondent is removable under Section 237(a)(2)(A)(iii) of the Immigration Act as having been convicted of an aggravated felony.

IT IS FURTHER ORDERED that respondent's application for 212(c), waiver of inadmissibility, is hereby pretermitted.

IT IS HEREBY ORDERED the respondent is ordered removed to Mexico on the charges contained in the Notice to Appear.

s/ Eleazar R. Tovar
ELEAZAR R. TOVAR
Immigration Judge

CERTIFICATE PAGE

I hereby certify that the attached proceeding before JUDGE ELEAZAR R. TOVAR, in the matter of:

ANTONIO RODRIGUEZ ZAPATA

A 36 743 567

Harlingen, Texas

is an accurate, verbatim transcript of the cassette tape as provided by the Executive Office for Immigration Review and that this is the original transcript thereof for the file of the Executive Office for Immigration Review.

s/ Nancy Cartino
Nancy Cartino, Transcriber

Free State Reporting, Inc.
1324 Cape St. Claire Road
Annapolis, Maryland 21401
(301) 261-1902

October 17, 2002
(completion date)

By submission of this CERTIFICATE PAGE, the Contractor certifies that a Sony BEC/T-147, 4-channel transcriber or equivalent, as described in Section C, paragraph C.3.3.2 of the contract, was used to transcribe the Record of Proceeding shown in the above paragraph.

APPENDIX D

United States Court of Appeals

FILED
Oct. 4, 2006

Charles R. Fulbruge III, Clerk

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 05-60778

ANTONIO RODRIGUEZ-ZAPATA,

Petitioner,

v.

ALBERTO R. GONZALES, U.S. ATTORNEY GENERAL,

Respondent.

Petition for Review of an Order of the
Board of Immigration Appeals

ON PETITION FOR REHEARING EN BANC

(Opinion 08/3/06, 5 Cir. _____, _____ F.3d _____)

Before SMITH, WIENER, and OWEN, Circuit Judges.

PER CURIAM:

(√) Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. No member of the panel nor judge in regular active service of the court having requested that the court be polled on Rehearing En Banc (FED. R. APP. P. and 5TH CIR. R. 35), the Petition for Rehearing En Banc is DENIED.

( ) Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. The court having been polled at the request of one of the members of the court and a majority of the judges who are in regular active service and not disqualified not having voted in favor (FED. R. APP. P. and 5TH CIR. R. 35), the Petition for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

s/ *Jacques L. Wiener*
United States Circuit Judge

REHG-7a

CLERK'S NOTE:
SEE FRAP AND LOCAL RULES 41 FOR STAY OF THE MANDATE

APPENDIX E

United States Code

8 U.S.C. § 1182(c) (1994 ed.): (excerpts)

Aliens lawfully admitted for permanent residence who temporarily proceeded abroad voluntarily and not under an order of deportation, and who are returning to a lawful unrelinquished domicile of seven consecutive years, may be admitted in the discretion of the Attorney General without regard to the provisions of subsection (1) (other than paragraphs (3) and (9)(C)) * * *. The first sentence of this subsection shall not apply to an alien who has been convicted of one or more aggravated felonies and has served for such felony or felonies a term of imprisonment of at least 5 years.

8 U.S.C. § 1229b(a): (excerpts)

(a) Cancellation of removal for certain permanent residents. The Attorney General may cancel removal in the case of an alien who is inadmissible or deportable from the United States if the alien –

(1) has been an alien lawfully admitted for permanent residence for not less than 5 years,

(2) has resided in the United States continuously for 7 years after having been admitted in any status, and

(3) has not been convicted of any aggravated felony.

IIRIRA

§ 304(b): REPEAL OF SECTION 212(c).—Section 212(c) (8 U.S.C. 1182(c)) is repealed.

U.S. Constitution

Amendment V: (excerpts)

No person shall . . . be deprived of life, liberty, or property, without due process of law * * *.